VILLAGE PROPERTIES (PVT) LTD

Versus

REGGIE FRANCIS SARUCHERA (in his capacity as Liquidator of 2nd respondent)

AND

JW JAGGERS WHOLESALERS (PVT) LTD
(In liquidation)

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 22 JULY & 13 OCTOBER 2016

Opposed Application

Advocate P. Ncube for the applicant
C. Nhemwa for the respondents

MAKONESE J: This is an application for an interdict *pendent lite*. The 1st respondent is the appointed liquidator of 2nd respondent (J W Jaggers Wholesalers (Pvt) Ltd) which was placed under liquidation by order of this court sometime in February 2011. In pursuance of his duties as liquidator, 1st respondent sought to sell certain fixtures, fittings and amenities to meet its financial obligations to its creditors. The fixtures and fittings are currently at two properties that applicant was leasing to 2nd respondent before it went into liquidation. There are two lease agreements between applicant and 2nd respondent with respect to the properties situate in Bulawayo and Kwekwe. A dispute has now arisen between applicant and 1st respondent over 1st respondent's expressed intention to dispose by sale the fixtures and fittings. Applicant avers that it owns the fixtures and fittings it has named and listed, whilst 1st respondent is adamant that such property is part of 2nd respondent's assets, and intends to sell such assets for the benefit of the creditors.

The relief sought by the applicant is couched in the following terms:

"It is ordered that:
1. The 1st respondent be and is hereby restrained and interdicted from selling or in any way disposing of the property listed in the schedule filed as annexure A to the applicant's founding affidavit for this application, pending the final determination of the action instituted by the applicant herein for a declaratory order declaring it the owner of the property.
2. The schedule referred to in paragraph 1 above shall always be attached to, and shall form part of this order.
3. Costs follow the cause."

Preliminary points

The 1st respondent has raised two points *in limine*, namely:-

(a) The application before the court is improperly before the court for failing to comply with the provisions of Order 32 Rule 232.

(b) The application was filed in contravention of section 213 of the Companies Act (Chapter 24:03) which provides as follows:

"In a winding up by the court:

(a) No action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose."

Whether the application is not properly before the court

The 1st respondent sought to argue that the application is not properly before the court by reason of failure to give adequate notice for the filing of opposing papers. In terms of Rule 232 of the High Court Rules, 1971, the applicant was required to give respondents at least 12 days notice to file their opposing papers. The issue taken by respondents is that the applicant failed to follow the proper procedure when it was indicated on applicant's papers that 10 days instead of 12 days notice to oppose was required, regard being had to the fact that the place where the application was served was more than 200 kilometres from the court where the application is to be heard. It was contended that such defect in the time given for filing opposing papers meant

that the papers were not properly before the court. The 1st respondent's legal practitioner did not persist with this argument. In any event as correctly pointed out by applicant's legal practitioner, the application was drafted in standard form, and applicant did not, by the mere insertion of the period of 10 days insist that the respondent must respond within 10 days. In any event, in my view, the applicant does not determine the time stipulations set out in the Rules of this court and therefore respondents were not obliged to comply with the said 10 day time stipulation period but stood guided by the law as contained in the Rules. Further, and in any event, the respondents were able to file their opposing papers within the 10 day period. There was no prejudice suffered by the respondents as a result of the 10 day stipulation. I therefore dispose of the first point *in limine* as lacking in merit and not fatal to the application.

Whether this application contravenes section 213 of the Companies Act

The second preliminary point taken by the 1st respondent is that the application contravenes section 213 of the Companies Act. It is contended that 1st respondent is cited in his capacity as the representative of the 2nd respondent and that whatever action is being sought against 1st respondent affects 2nd respondent, hence 2nd respondent is cited as an interested party and as such the provisions of section 213 of the Companies Act applies in these proceedings. The argument is extended further to indicate that the fixtures, fittings and amenities that are being administered by 1st respondent are the subject matter of this application and consequently any order sought and granted against 1st respondent in his capacity as liquidator will result in prejudice to the 2nd respondent. For that reason, it was argued on behalf of 1st respondent that leave should be obtained first before any proceedings against the respondents are commenced.

It is my view that the argument that the provisions of section 213 of the Companies Act have not been followed is not well grounded. 1st respondent is not itself under liquidation. It is 2nd respondent (J W Jaggers Wholesalers (Pvt) Ltd), which is under liquidation. 2nd respondent has been merely cited as an interested party, without whose predicament, 1st respondent would not be in place. It is evident that no order is being sought against 2nd respondent in this application, and as such these proceedings do not constitute action or proceedings against 2nd

respondent as contemplated under section 213 (a) of the Companies Act. This court had occasion to deal with a similar situation in the case of *Elphias Kawa* v *Victor Muzenda (NO) and Ors* HB-10-14.

This application is not in contravention of section 213 of the Companies Act since no substantial relief is sought against 2nd respondent. I accordingly dispose of the second preliminary point and proceed to deal with the merits.

On the merits

It is contended by respondent that the applicant has failed to establish a clear right to warrant the granting of the order sought. The requirements of an interdict *pendent lite* were clearly laid out in the case of *Blimas* v *Dardagan* 1951 (1) SA 140. The court held that to obtain an interdict the applicant must satisfy the court either:

(a) that he has a clear right and that injury has been committed or reasonably apprehended
(b) that he has a *prima facie* right and that irreparable injury will be caused to him if the interdict is not granted.

In its founding affidavit, the applicant has laid bare claims of right in the fixtures and fittings. There is no documentary proof in applicant's papers asserting a clear right. The mere production of a list of fixtures and fitting does not in any way prove any right of ownership in the property in question. The lease agreement entered into between applicant and 2nd respondent stipulates in clause 4 (iii) that the fixtures and fittings belonged to the lessee and that on termination the fixtures and fitting were to be removed. There is no ambiguity in the terms of the lease agreements as to whom the fittings and fixtures belong to. It has not escaped the court's attention that the lease agreement between applicant and 2nd respondent relates to buildings erected on the industrial stands in issue. The fittings and fixtures were not listed as annexures to the lease agreements and are not part of the lease agreements. The logical

conclusion is that whatever property belonged to 2nd respondent was removed upon termination of the lease as contemplated by the express provisions of the lease.

1st respondent is well within his rights to dispose of these fixtures and fittings in his capacity as liquidator. The applicant is prevented by the parol – evidence rule which prohibits a party to a contract that has been integrated into a single and complete document from introducing extrinsic evidence which has the effect of contradicting, adding to or modifying the written terms. See the cases of *Johnson* v *Leal* 1980 (3) SA 927 and *Union Government* v *Vianini Ferro Concrete Pipes (Pty) Ltd* 1941 AD 43.

I am not satisfied that the applicant has established a clear right. Applicant has laid a bare claim to the property not supported by its papers.

In the case of *ZESA Pension Fund* v *Mushambadzi* SC-57-02, ZIYAMBI (JA), stated as follows:-

> "With regard to a temporary interdict, the following must be established:-
>
> 1. a right which, though *prima facie* established is open to some doubt;
> 2. a well grounded apprehension of irreparable injury;
> 3. the absence of any other remedy;
> 4. the balance of convenience favours the applicant."

In my view neither a clear right nor a *prima facie* right has been established by the applicant. There is no well grounded apprehension of harm as the property that is referred to as fixtures and fittings is dealt with in accordance with the lease agreement. The liquidator's duty is to ensure that assets belonging to 2nd respondent are disposed in terms of the law. The applicant had various options to protect their interests. The 2nd respondent was placed under liquidation in February 2011. No explanation has been given why applicants only took action in 2014. In any event, case number HC 2006/14 has not been pursued or concluded. In this matter, there can be no doubt the balance of convenience weighs heavily against the granting of interdict in that the delay in the sale of the fixtures and fittings over a frivolous claim of right by the

applicant will prejudice all the creditors of the 2nd respondent who are intended to benefit from the sale of such property.

In *Eriksen Motors (Welkom)* v *Protea Motors and Anor* 1973 (3) SA 685 the learned judge stated that an interim interdict *pendete lite* is an extraordinary remedy within the discretion of the court and that in exercising its discretion the court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes known as the balance of convenience.

On the basis of the foregoing, I am of the view that the applicant's application has no merit and I, accordingly make the following order:-

1. the application be and is hereby dismissed.
2. The applicant shall bear the costs of suit.

Phulu & Ncube, applicant's legal practitioners
C. Nhema & Associates, respondents' legal practitioners